Supreme Court of the United States

October Term, 1916.

No. 270.

MARIAN S. HONEYMAN,

Appellant,

vs.

HERBERT G. HANAN, as Executor of the Last Will and Testament of HERBERT W. HANAN, deceased,

Appellee.

BRIEF FOR APPELLANT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 370.

MARIAN S. HONEYMAN,
Appellant,

vs.

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan,
Respondent.

BRIEF FOR APPELLANT.

Jurisdiction.

Appellant filed a statement as to the jurisdiction of this Court as part of the papers presented to the Chief Judge of the Court of Appeals upon the allowance of the appeal. Subsequently leave was asked to amend this statement and upon the application for such leave appellee filed a motion for a dismissal. Upon consideration, this Court entered the following order:

> "Further consideration of the question of the jurisdiction of this Court in this case and of the motion to dismiss or affirm is postponed to the hearing of the case on the merits."

Statement of the Case.

This action is upon a written instrument or bond evidencing a loan made by appellant's guardians to appellee's testator and others in 1920. As security for this instrument, the borrowers pledged a bond and mortgage owned by them, executed and delivered in 1907 by the John H. Hanan Realty Company, the mortgage being upon a loft building located at the corner of Bleecker and Elizabeth Streets, New York City. Upon default in the payment of interest on the loan and appellee's testator having died, and the Hanan Realty Company having defaulted in the payment of interest and taxes upon its bond and mortgage, the appellant foreclosed her security and sold the mortgaged property at a foreclosure sale and exhausted her remedies upon the security as required by the laws of the State of New York. She then brought this action to establish her claim against the appellee's testator's estate. This action is not a foreclosure action nor is it an action to recover upon the mortgage debt or any part thereof.

The appellee did not answer the complaint or the amended complaint and no issue of fact exists.

Upon motion at Special Term the complaint was dismissed, the Court merely handing down a memorandum as follows (not reported in the Official Reports; see New York Law Journal, June 26, 1935):

> "Motion by defendant to dismiss the amended complaint is granted. The mortgage moratorium laws apply to the facts alleged in the said complaint" (Record, p. 15).

Final judgment was entered upon this decision dismissing the complaint with costs (Record, p. 7).

Upon appeal to the Appellate Division, the judgment was affirmed without memorandum or opinion (246 App. Div. 781; Record, p. 17), and upon a further appeal to the Court of Appeals the judgment was affirmed, likewise without memorandum or opinion (271 N. Y. 564; Record, p. 21).

On motion, the remittitur of the Court of Appeals was amended so that the same contained the following statement (Record, p. 3):

> "A question under the Federal Constitution was presented and necessarily passed upon by this court. The plaintiff contended that chapter 794 of the Laws of the State of New York, enacted in 1933, as amended (Secs. 1083-a and 1083-b of Civil Practice Act), impairs the obligations of contracts, and thus violates article 1, section 10, of the Constitution of the United States. This court held that such laws do not violate said provision of article 1, section 10, of the Constitution of the United States" (271 N. Y. 662).

Prior to the enactment of Chapter 794 above referred to, a referee appointed to sell property under a judgment of foreclosure made and filed his report showing his proceedings and the sale and the disposition of the proceeds and the Clerk of the Court entered a deficiency judgment for the difference between the amount due and the net amount realized upon the sale (§1083, Civil Practice Act); and in any action upon a bond, plaintiff was entitled to judgment for any sum due and unpaid.

Chapter 794 of the Laws of 1933 (which is printed in full as Appendix A hereto) added two new sections to the Civil Practice Act, 1083-a and 1083-b.

Section 1083-a provides that after sale in foreclosure, on motion, the Court

> "shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus cost and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property, whichever shall be the higher. If no motion

> for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist."

Section 1083-b provides that in an action upon a bond, other than an action to foreclose a mortgage, secured by a mortgage on real estate, "any person directly or indirectly or contingently liable therefor" may "set off the fair and reasonable market value of the mortgaged property less the amounts owing on prior liens and encumbrances." (By Chapter 277, Laws of 1934, and Chapter 2, Laws of 1935, the period of the emergency has been extended to July 1, 1936, and has been further extended to July 1, 1937.)

This action being, as stated, upon a bond, which was secured by a bond and mortgage, the New York Courts have held that §1083-b is applicable and that appellant may not recover. The only possible theory to support the decision is that she has alleged in her complaint that a deficiency judgment was denied her in the foreclosure proceeding, and this is construed to be equivalent to an allegation that the foreclosed property was of a value equal to the debt; that the mortgage was security for the debt here sued upon, and that appellee is entitled to credit for payment in full regardless of the amount for which the property was actually sold. There is no other provision of the Mortgage Moratorium Laws applicable, and *there is no other possible interpretation of the decisions of the New York Courts.*

Assignment of Errors Relied Upon.

1. The State Court erred in holding that Chapter 794 of the Laws of 1935 of the State of New York was a bar to appellant's action to establish her claim against the decedent's estate for the sum remaining unpaid upon a loan to decedent made in 1920, evidenced by a written obligation to pay, as security for which there was pledged and assigned to appellant a bond and mortgage executed by another in 1907, and which had been foreclosed by appellant after the

enactment and taking effect of said legislative act for non-payment of interest and taxes, and the proceeds of sale duly credited upon account of the loan.

3. The State Court erred in refusing to hold that Chapter 794 of the Laws of 1933 violates the Federal Constitution by requiring that mortgagees are required to accept the proceeds of the sale of mortgaged property or the property itself, if bid in by the mortgagee, at the amount determined by the State Court to be market value of the property, as a credit or offset against the mortgage debt.

6. The State Court erred in refusing to hold that the Act of the Legislature of the State of New York, Chapter 794 of the Laws of 1933, is repugnant to Article 1, Section 10, of the Constitution of the United States, in that it impairs appellant's contract rights, denies the enforcement thereof, and permits the repudiation of decedent's debt, and in that it destroys appellant's rights and property without due process and without compensation.

7. The State Court erred in refusing to hold that Chapter 794 of the Laws of 1933 of the State of New York violates the Constitution of the United States, in that it limits and abrogates contract rights in the matter of deficiency judgments and actions on bonds or other written obligations without regard to the necessities or the protection of the creditor or the ability of the debtor to pay.

Summary of Argument.

Appellant contends that—

POINT I. The instrument sued upon is a primary obligation and is not a mortgage debt or a guarantee of a mortgage debt.

The New York Courts have, nevertheless, construed the instrument as one subject to the provisions of §1083-b of the Civil Practice Act.

POINT II. The appellant's contract has been materially impaired if Chapter 794, Laws of 1933, is applicable thereto.

At the time the contract was made it was subject to the existing law which entered into and became a part thereof. The Act complained of requires appellant in any action she may bring to credit the debtor with the "fair market value" of the mortgaged property, whether it be sold or not, or whatever it may bring at a sale.

POINT III. The provisions of Chapter 794, Laws of 1933, impair the obligations of appellant's contract and thus violate the constitutional prohibition upon such legislation.

The Supreme Court of the United States has consistently held over many years that the vacation or serious modification of pre-existing law as it affects a contract is repugnant to Section 10, Article 1, of the Constitution, and practically all of the State Courts that have had occasion to pass on similar laws have similarly decided, save only the Courts of the State of New York.

ARGUMENT.

POINT I.

The instrument sued upon is a primary obligation and is not a mortgage debt or a guarantee of a mortgage debt.

The loan made by appellant's guardians to defendant's testator is evidenced by a written instrument attached to the complaint, Exhibit A (Record, p. 12). Briefly, it is in the form of a bond of defendant's testator (jointly and severally with his father and brother) to the guardians of the appellant (and her sister, to whose interest plaintiff succeeded as alleged in the complaint) (Record, p. 10). This instrument, executed August 9, 1920, acknowledged an indebtedness in the sum of $60,000 and is an absolute agreement to

pay that sum. The instrument then refers to a bond of the Hanan Realty Company secured by a mortgage on its property executed in 1907, which bond and mortgage are stated to be owned by one of the obligors, who is about to assign said bond and mortgage to appellant's guardians, and states:

> "WHEREAS, to induce the said obligee to advance the said sum of sixty thousand dollars ($60,000) upon the said bond and mortgage, as aforesaid, and to execute and deliver the said extension agreement the said obligors hath agreed to make, execute and deliver this bond as further and additional security for the payment of the said above-mentioned bond and mortgage."

Then follows the condition that if the obligors of the 1920 bond or the John H. Hanan Realty Company pay the appellant's guardians $60,000 and interest, and if the obligors of the 1920 bond indemnify the obligees against any loss, damages, costs, expenses, etc., by reason of any default in the 1907 bond, then the 1920 obligation is to be void.

It is to be observed that the transaction was not a sale of the 1907 bond and mortgage with a guaranty. It was a loan or advance to the owners of the 1907 bond, and the obligation of the borrowers is to repay, not upon condition but absolutely. If the obligors repaid the loan it would not extinguish the *mortgage* debt of the John H. Hanan Realty Company. The obligors would be entitled to a reassignment of the 1907 bond and mortgage. The instrument sued upon is a new and original obligation. It is not a mortgage debt and it is not a guaranty of a mortgage debt.

In 28 *Corpus Juris*, page 886, §1, it is stated:

> "The term 'guaranty' or 'guarantee' as it is called by some authorities, especially the English and Canadian jurists and text writers, is a collateral promise or undertaking by one person to answer for the payment of some debt or the performance of some contract or duty in case of the default of another person, who in the first instance is liable for such payment or performance; a collateral promise or undertaking to pay a debt owing by a third person in case the latter does not pay. It is an agreement by one

person to answer to another for the debt, default, or miscarriage of a third person. * * * In a strict or collateral guaranty the obligation of the guarantor is that the principal is able and will perform his undertaking, or, if he fails, that the guarantor will pay the resulting damages; but where the promise of the guarantor is to do that which another is bound to do if he shall not do it himself, it is not a strict or collateral guaranty, but is an original undertaking in the nature of suretyship, and if it can be seen that the person sought to be held is primarily liable, prior to the breach of the contract or duty by someone else, the contract in question is an original promise or undertaking and not one of guaranty; and, although a contract is in form to answer for the debt or default of another, if its leading purpose is to secure some benefit to the promisor or to promote his interest, it will be regarded as an original undertaking."

In *Clark* v. *Howard*, 150 N. Y., at page 239, the Court said:

"The character of the defendants' promise is not to be determined solely with reference to the language employed. Words to the effect that a third party will see the debt paid, or become responsible or the like, have been held to import an original and absolute promise when taken in connection with the facts and circumstances of the transaction. (*Chase* v. *Day*, 17 Johns. 114; *Mountstephen* v. *Lakeman*, L. R. [7 Eng. & Ir. App.] 17.)

It is true that the meaning of such words, whether imputing an original or collateral promise, has been discussed mostly in cases where the Statute of Frauds has been relied upon as a defense; still the same principle will apply in any case where it is material to determine whether a promise is original or not. If the defendants intended to and did make this debt their own by a promise founded upon a new and original consideration of benefit to the defendants, moving to them from the debtor, the fact that the debt may still subsist against the original debtor is no objection to a recovery."

In *Matter of People* (Title & Mortgage Guarantee Co.), 264 N. Y., at page 88, the Court said:

> "It is said that the certificate holders are the owners of the mortgages underlying the certificates * * *. Though the certificate states that the company 'assigns to the registered holder hereof an undivided, coordinate share of the same amount in the principal sum secured by the bonds and mortgages deposited or which may hereafter be deposited by the Company with the Marine Trust Company of Buffalo, * * * as depositary under the terms of an agreement bearing date June 10, 1927, subject to which this certificate is issued, together with interest thereon at the rate of 5½% per annum,' an analysis of all the terms of the certificate and of the contract, to which it is subject, discloses that the guaranty company has entered into an unconditional promise to pay, ten years from the date of the certificate, the principal sum secured and accrued interest and has transferred to the holder only an interest in the deposited mortgages as collateral security for its debt. Certainly the holder acquires, prior to default, no rights in the mortgages other or greater than the rights of a holder of collateral security and the guaranty company retains at least the rights of an owner who has cumbered his title with a lien. True the certificate provides that the guaranty company shall exercise these rights as 'agent' for the holder of the certificate, *but we construe the contract in accordance with its substance and effect, not with its form.* So construed, the guaranty company *is a primary debtor*, assigning the mortgages only as collateral security for the debt." (Italics ours.)

In the case at bar, the instrument does not say that appellee's testator will pay *if* or *in the event* that the Hanan Realty Company does not pay. It does not say that the obligors will pay the 1907 bond at all. The obligors in the instrument sued on acknowledge an indebtedness of $60,000, *which sum they agree to pay.* They say they are procuring an *advance* on the 1907 bond and mortgage owned by the obligors and which they are assigning to the obligee. They say that if the 1907 bond is paid, or if they themselves pay

the full amount of $60,000 and interest, then the obligation is to be void. They also *indemnify* obligee against any "loss, damages, costs, expenses, suits, actions, claims and demands, etc.," by reason of default in the terms of the 1907 bond and mortgage. This indemnity covers expense incident to protect the mortgage lien, such as taxes, assessments, insurance, legal costs and expenses of any action affecting it.

The obligors in the 1920 bond could not be sued upon the 1907 bond for nowhere did they agree to pay it. It is a direct and unconditional obligation to repay the moneys advanced to the obligors. It is not a "mortgage" debt or a guaranty of a mortgage debt, nor does the bond make the obligors liable for a mortgage debt "directly, indirectly or contingently."

POINT II.

Appellant's contract has been materially impaired if Chapter 794 of the Laws of 1933 is applicable thereto.

In *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, the Court say:

> "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike, those which affect its validity, construction, discharge, and enforcement. * * *"

And at page 552:

> "* * * Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion."

And in *W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 638, 640, it is said:

> "To know the obligations of a contract we look to the laws in force at its making."

See also *Rutherford* v. *Cook,* 198 N. Y. 29, 33 (1910), and *N. Y. Life Ins. Co.* v. *Guttag,* 265 N. Y. 292, 296 (1934).

Prior to the enactment of Chapter 794, Laws 1933, the appellant could foreclose upon her collateral security and then maintain an action to recover the unpaid balance of her loan to appellee's testator. §1082 of the Civil Practice Act provides for final judgment in foreclosure directing a sale of the property and §1083 provides for a final judgment against any person liable for the residue of the debt remaining unsatisfied after the sale and the application of the proceeds.

The Court of Appeals held in *Feiber Realty Corp.* v. *Abel,* 265 N. Y. 94, that the docket of a deficiency judgment was merely a clerical act in pursuance to the direction of the judgment entered, citing *Morris* v. *Morange,* 38 N. Y. 172.

Since the enactment of Chapter 794, Laws 1933, under §1083-b of the Civil Practice Act, the New York court has held that appellant *must* credit upon her loan to appellee's testator the "fair and reasonable market value" of the mortgaged property, and that having alleged that a deficiency judgment was denied in the foreclosure action her loan must be deemed to have been repaid by legislative enactment.

The New York Court of Appeals say in *City Bank Farmers Trust Co.* v. *Ardlea,* 267 N. Y. 225, that

> "Sections 1083-a and 1083-b were enacted at the same time as Sections 1077-a and 1077-b and as part of the general purpose of affording relief to distressed debtors. * * * Section 1083-a prevents a deficiency judgment when the court finds that the fair market value of the premises covered by the mortgage equals or exceeds the amount specified in the judgment and prior liens. Section 1083-b affords the same protection, in actions against makers or guarantors of bonds, 'against any person or corporation directly or indirectly or contingently liable therefor.' "

These sections obviously impair the contract rights of this appellant.

If the mortgagor does not pay interest or taxes for any reason, certainly the holder of the mortgage, whether as security or otherwise, should do something for his own protection. The necessities of the holder may be fully as great, if not greater, than those of the mortgagor. If nothing is done the debt will increase at an alarming rate. The holder *must* do something to save himself the utter loss of his security and his entire debt. If he proceeds to foreclosure and sale—and there is nothing to prevent—he obtains whatever the property brings or the property itself, which he may not want. The property may have become largely depreciated and may not earn enough to pay taxes.

Now, the New York statute says (§1083-a) that

> "No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section where the mortgaged property shall be sold during the emergency, except as herein provided."

The statute then states that within ninety days after the date of sale a motion may be made for a deficiency judgment and the Court shall determine "the fair and reasonable market value of the mortgaged premises as of the date of sale" and shall limit the deficiency judgment accordingly, and adds:

> "If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceedings shall exist."

Under §1083-b, if suit is brought on a bond or any guaranty or indemnity, even if only indirectly secured by mortgage, the value of the property, to be determined by the Court, may be *offset or credited against the amount due.* In other words, a penalty is imposed upon anyone who dares

to sell in foreclosure or bring suit upon an obligation secured in any remote degree by a mortgage during the emergency when in all conscience he must do something to protect himself against a defaulting debtor and the penalty is a loss of his contract rights. In the case at bar, appellant has been deprived of her contract rights—not *temporarily*, but *absolutely and forever*. What about the debtor? What is he required to do? *Nothing*. He may be rich or poor, it makes no difference. At the time of making this contract, as the Court of Appeals in *Sliosberg* v. *New York Life Ins. Co.*, 244 N. Y. 482, at page 498, say:

> "That a debtor has lost the wherewithal to pay is no defense, whether its loss is attributable to simply robbery or to piracy which has been coated white by legislation."

But now he does not have to show his financial status. He is not required to trustee his property, as security. He is given relief which is neither temporary or on condition, and he does not even have to ask for relief.

Where, in appellant's contract with the appellee's testator, does she agree that the Court may determine the value of the property and that the debt is to be paid in full or to the extent that the Court may direct? *Where did she agree that her loan could be repaid by legislative enactment and not by legal tender?* If a debtor is really distressed he has a remedy by bankruptcy, but the Legislature of the State of New York has no power to give to a debtor the benefits of the Bankruptcy Act, nor has it power to impose any of the conditions set forth in §1083-a and §1083-b in reduction of the amount due.

POINT III.

The provisions of Chapter 794, Laws of 1933, impair the obligations of appellant's contract and thus violate the constitutional prohibition upon such legislation.

The Constitution of the United States states:

> "No state shall * * * pass any * * * law impairing the obligations of contracts. * * *" (Art. 1, Sec. 10).

In the case of *Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U. S. 398 (1934), the Court said (p. 431):

> "The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them (*Sturges* v. *Crowninshield*, 4 Wheat. 122 [1819], pp. 197, 198) and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights."

In *Green* v. *Biddle*, 8 Wheat. 1 (1823), the Court said (p. 17):

> "It is no answer, that the acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests."

In *Bronson* v. *Kinzie*, 1 How. 311 (1843), the Court said (p. 316):

> "* * * Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution."

Likewise, the Court, in *McCracken* v. *Hayward*, 2 How. 608 (1844), significantly stated (p. 612):

> "* * * The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. * * * If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favour of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

In *Bronson* v. *Kinzie, supra*, two Illinois statutes were involved, the first of which provided that the equitable estate of the mortgagor should not be extinguished for twelve months after sale on foreclosure, and the second, that there should be no sale unless two-thirds of the appraised value of the property should be bid therefor. The Court held both statutes unconstitutional. In condemning the second, the Court said (p. 320):

> "The observations already made in relation to the other act apply with equal force to this. It is true that this law apparently acts upon the remedy, and not directly upon the contract. Yet its effect is to deprive the party of his pre-existing right to foreclose the mortgage by a sale of the premises, and to impose upon him conditions which would frequently render any sale altogether impossible."

In the cases of *McCracken* v. *Hayward, supra, Gantly's Lessee* v. *Ewing*, 3 How. 707 (1845), and *Howard* v. *Bugbee*, 24 How. 461 (1860), the decision in *Bronson* v. *Kinzie, supra*, was followed. The *McCracken* case, *supra*, condemned a statute which provided that an execution sale should not be made of property unless it would bring two-thirds of its value according to the opinion of householders, while the case of

Gantly's Lessee condemned a statute which required a sale for not less than one-half the appraised value. *Howard* v. *Bugbee, supra,* made a similar ruling as to an extension of two years for redemption from foreclosure sale. *Edwards* v. *Kearzey,* 86 U. S. 595 (1877), condemned as unconstitutional a statute which, as applied to existing contracts, increased the amount of the property of judgment debtors which was exempted from levy and sale on execution. And in *Barnitz* v. *Beverly,* 163 U. S. 118 (1896), it was held that a statute which authorized the redemption of property sold on foreclosure, where no right of redemption previously existed, or which extended the period of redemption beyond the time formerly allowed, could not constitutionally apply to a sale under a mortgage executed before its passage. This decision was followed by the Court in *Bradley* v. *Lightcap,* 195 U. S. 1 (1904), in condemning a statute which effected a forfeiture of the mortgagee's estate upon his failure to obtain a deed within the prescribed time after bidding in the mortgaged premises at sale on foreclosure.

Upon the same principles, State Courts have condemned statutes which, as applied to existing mortgages, permit foreclosure sales only for not less than a fixed percentage of the appraised value of the property.

Swinhouse v. *Mills,* 17 Wash. 611, 50 Pac. 489 (1897);
Strand v. *Griffith,* 63 Wash. 334, 115 Pac. 512 (1911);
Robards v. *Brown,* 40 Ark. 423 (1883).

The principle stated in *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, has been materially clarified by the further decisions of the United States Supreme Court in

W. B. Worthen Co. v. *Thomas,* 292 U. S. 426;
W. B. Worthen Co. v. *Kavanaugh,* 295 U. S. 56;
Louisville Bank v. *Radford,* 295 U. S. 920.

In the first of these cases, *W. B. Worthen Co.* v. *Thomas,* the Court, referring to the *Blaisdell* case, said (pp. 433-434):

> "In *Home Bldg. & L. Asso.* v. *Blaisdell* (290 U. S. 434), we held that 'the reserved power of the State

must be construed in harmony with the fair intent of the constitutional limitation and that this principle precluded a construction which would permit the State to adopt as its policy *the repudiation of debts or the destruction of contracts or the denial of means to enforce them.*' * * * and 'when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, *that action must be limited by reasonable conditions appropriate to the emergency.* Accordingly, in the Blaisdell case we sustained the Minnesota mortgage moratorium law in the light of the temporary and conditional relief which the legislation granted. We found that relief to be reasonable, *from the standpoint of both mortgagor and mortgagee, and to be limited to the exigency to which the legislation was addressed.*

'In the instant case, the relief sought to be afforded is neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the Act contains no limitations as to time, amount, circumstances, or need. We find the legislation as here applied, to be a clear violation of the constitutional restriction.'" (Italics ours.)

In *W. B. Worthen Co. v. Kavanaugh,* the Court (unanimously) said:

> "Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage, without moderation or reason, or in the spirit of oppression, even when the public welfare is involved as an excuse, their bounds must be respected,"

and condemned the Arkansas legislative acts as unconstitutional, distinguishing the *Blaisdell* case.

In *Louisville Bank* v. *Radford* the Court held certain provisions of the Frazier-Lemke Act unconstitutional, citing, applying and distinguishing the principles of the *Blaisdell* case and the two cases above referred to. The Court said:

> "Under the Act, the purpose of the *delay* in making a sale *and of the prolonged possession accorded the mortgagor* is to promote his interests at the expense of the mortgagee.

> *Home Bldg. & L. Asso.* v. *Blaisdell,* 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A. L. R. 1481, upon which Radford relies, lends no support to his contention. There the statute left the period of the extension of the right of redemption to be determined by the court within the maximum limit of two years. Even after the period had been decided upon, it could, as was pointed out, be reduced by order of the court under the statute, in case of a change in circumstances, * * *' (p. 447); and at the close of the period, the mortgagee was free to apply the mortgaged property to the satisfaction of the mortgage debt (pp. 933-934) * * *."

In the case of *Beaver County Building & Loan Assn.* v. *Winowich* [No. 153, Oct. 5, 1936, reported only at the time of this writing in Advance Sheets of Nov. 14th, 187 Atl. (Pa.) 481] there was under consideration the Pennsylvania Mortgage Deficiency Act (1934), and it was held unconstitutional as to mortgages contracted before its enactment because of the constitutional provision prohibiting the impairment of obligations of contracts. Under the laws of Pennsylvania in effect at the time of the enactment of the statute, a mortgagee was entitled to a deficiency judgment in an amount equal to the amount of the mortgage debt, interest and costs, after deducting therefrom the net proceeds of a foreclosure sale. The Act under consideration provided for a deficiency judgment in an amount fixed by deducting the fair value of the property instead of the proceeds of the foreclosure sale. The Court say:

> "The sale price is no longer conclusive between the parties as to the credit to be allowed on the debt, and the amount of the deficiency judgment to which the mortgage was previously entitled is thus altered to a substantial and, it may be, drastic degree. * * *
>
> The remedy, or means of enforcing a contract, is a part of its obligation which the Constitution protects. TheLegislature has the power to formulate, alter and suspend modes of procedure, even as to pre-existing contracts, provided, that, under the guise of a procedural statute, it does not deprive a party of any substantial right under the contract. *Breitenbach* v.

Bush, 44 Pa. 313, 318, 320; *Penrose* v. *Erie Canal Co.,* 56 Pa. 46, 48; *West Arch Building & Loan Association* v. *Nichols,* 303 Pa. 434. Any change in procedure which does not supply an alternative remedy, equally adequate and efficacious, in place of that which existed when the contract was made, is violative of the constitutional prohibition. The ideas of right and remedy are inseparable. *Greene* v. *Biddle,* 8 Wheat. 1, 17; *Walker* v. *Whitehead,* 16 Wall. 314, 317; *Edwards* v. *Kearzey,* 96 U. S. 595, 600; *McGahey* v. *Virginia,* 135 U. S. 662, 693; *Barnitz* v. *Beverly,* 163 U. S. 118, 127; *Oshkosh Waterworks Co.* v. *Oshkosh,* 187 U. S. 437, 439. * * *

The change wrought by the Pennsylvania Mortgage Deficiency Judgment Act is one not merely of remedy but of substance. Whereas before its enactment the mortgagee after a sale on foreclosure had the important right to a judgment measured by the difference between the debt and the net proceeds realized from the sale, by the terms of the act this judgment is reduced by substituting the 'fair value' of the property for the price obtained at the sale as the amount of the credit to be allowed."

After citing *Home Bldg. & L. Assn.* v. *Blaisdell* and *W. B. Worthen Co.* v. *Kavanaugh,* and many of the cases hereinbefore referred to, the opinion adds:

"While it is true that none of the cases thus summarized is wholly analogous to the present one, they lead fairly to the conviction that a statute which compels a mortgagee to accept real estate at an appraised valuation, in place of money, as a part liquidation of the mortgagor's obligation on the bond, must, as applied to pre-existing mortgages, be held to be unconstitutional if the obvious trend of these decisions in the Supreme Court of the United States is to be followed.

This conclusion is strengthened by the almost complete unanimity of state courts in striking down recent legislation curtailing the rights of mortgagees—some of it practically identical with the act now under consideration. * * *"

And at page 492:

"It is contended that it is unfair to allow a mortgagee, under existing conditions, to bid in the mort-

gaged property for a nominal sum, thereby enriching himself by acquiring the security and at the same time retaining the right to collect what might amount to almost the entire debt from other property of the mortgagor.

It may be questioned whether mortgagees in many cases have been able to realize more from both acquisition of the property and collection on the bond than the amount of the debt, interest and costs. Even if, however, as a bidder at the foreclosure sale, a mortgagee obtains the property at a cheap price, he accomplishes this, as already stated, in an independent capacity and not as mortgagee; as a purchaser he obtains the same title as might have been acquired by any member of the general public in competitive bidding. Moreover, if the system of foreclosure in use does bring about undesirable results, it may be corrected by the parties' originally contracting to adopt the appraisement method (assuming that an investor could be induced to loan money on the security of a mortgage with such a provision), or, as to future mortgages, by appropriate legislation. But as to existing mortgages the constitutions of Nation and State alike prohibit any such impairment of the mortgagee's rights."

In *Sayre* v. *Duffy*, 13 N. J. Misc. 458, 179 Atl. 459, the New Jersey statute, Chapter 82 of the Laws of 1933, providing that the Court should determine the amount of the deficiency in mortgage foreclosures by deducting from the amount of the debt the fair market value of the premises, was held to be unconstitutional, the Court saying:

"The effect is not to delay the remedy but to abrogate completely the rights of the mortgagee to a deficiency judgment."

Vanderbilt v. *Brunton Piano Co.*, 111 N. J. L. 596, 169 Atl. 177, likewise holds the New Jersey statute unconstitutional.

In *Beaver County Building & Loan Assn.* v. *Winowich*, *supra*, the Court say (p. 491) that

"New York is apparently the only state that has sustained the validity of a mortgage deficiency judgment

> act similar to the Pennsylvania statute. The act temporarily stayed foreclosures and suits to recover the mortgage indebtedness if interest and taxes were paid. It also provided for a deficiency judgment to be fixed at the time of confirmation of the sale, allowing a credit for the market value of the property as determined by the court, or the sale price, whichever might be the higher. In actions to recover the indebtedness secured by the mortgage, the debtor was to be allowed to set off the 'fair and reasonable market value' of the property. In a brief opinion on the question of constitutionality, unsupported by any citation of authorities, the court upheld the act. *Klinke* v. *Samuels*, 264 N. Y. 144."

The New York Court of Appeals, however, added:

> "That such legislation, reasonably seeking only temporary relief, is not unconstitutional, we may refer to our recent decision in *Matter of People* (*Title & Mortgage Guarantee Co.* v. *Buffalo*) (264 N. Y. 69), and *Home Building & Loan Assn.* v. *Blaisdell* (290 U. S. 398)."

In *Home Bldg. & Loan Assn.* v. *Blaisdell*, this Court sustained the constitutionality of the Minnesota Mortgage Moratorium Law, stating:

> "We are here concerned with the provisions of Part One, §4, authorizing the District Court of the County to extend the period of redemption from foreclosure sales 'for such additional time as the court may deem just and equitable,' subject to the above described limitation. The extension is to be made upon application to the court, on notice, for an order determining the reasonable value of the income on the property involved in the sale, or if it has no income, then the reasonable rental value of the property and directing the mortgagor 'to pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, mortgage * * * indebtedness at such times and in such manner' as shall be determined by the court."

The Minnesota statute did not suspend foreclosure or regulate deficiency judgments. It *extended* the period of redemption *after* foreclosure for a period not exceeding two years *upon terms and conditions* to be fixed by the Court after a hearing.

We do not here question Chapter 793 of the Laws of 1933, which prohibits foreclosure during the emergency period *so long as interest and taxes* are paid and as to which it might be said that it is "temporary relief." We are concerned *only* with Chapter 794, which clearly impairs remedies against mortgagors, guarantors, indemnitors, or persons liable in any way to a holder of a mortgage; and in the case at bar is held to be an actual bar to an action to recover upon a loan for which there was pledged as security a bond and mortgage, as we have already pointed out in our Point II. Under the Minnesota statute a debtor was required to apply for relief and show facts to a court of equity to justify a brief extension for redemption *upon terms and conditions.* Under the New York act a debtor does nothing and no consideration whatever is given to the rights of the creditor. The New York act simply benefits the debtor by releasing him from his obligation.

No such question as is here presented was passed upon by this Court in the *Blaisdell* case.

This Court has consistently held over many years that the vacation or serious modification of pre-existing law as it affects an existing contract is repugnant to Section 10 of Article 1 of the Constitution.

W. B. Worthen Co. et al. v. *Kavanaugh,* 295 U. S. 56, 79 L. Ed. 1298 (1935);

W. B. Worthen Co. v. *Thomas,* 292 U. S. 426, 78 L. Ed. 1344 (1934);

Bradley v. *Lightcap,* 195 U. S. 1, 49 L. Ed. 65 (1904);

Barnitz v. *Beverly,* 163 U. S. 118, 41 L. Ed. 93 (1896);

McGahey v. *State of Virginia,* 135 U. S. 662, 34 L. Ed. 304 (1890);

Edwards v. *Kearzey*, 96 U. S. 595, 24 L. Ed. 793 (1878);

Walker v. *Whitehead*, 16 Wall. 314, 21 L. Ed. 357 (1873);

Gunn v. *Barry*, 15 Wall. 610, 21 L. Ed. 212 (1873);

White v. *Hart et al.*, 13 Wall. 646, 20 L. Ed. 685 (1872);

Von Hoffman v. *Quincy*, 4 Wall. 535, 18 L. Ed. 403 (1867);

Howard v. *Bugbee*, 24 How. 461, 16 L. Ed. 753 (1861);

Guntly v. *Ewing*, 3 How. 707, 11 L. Ed. 794 (1845);

McCracken v. *Hayward*, 2 How. 608, 11 L. Ed. 397 (1844);

Bronson v. *Kinzie*, 1 How. 311, 11 L. Ed. 143 (1843).

Many of the State courts which have had occasion to pass upon the constitutionality of similar legislation have similarly decided:

Travelers Ins. Co. et al. v. *Marshall et al.*, 124 Tex. 45, 76 S. W. (2nd) 1007 (1934);

Federal Land Bank of Omaha v. *Wilmarth et al.*, 218 Iowa 339, 252 N. W. 507, 90 A. L. R. 1330 (1934);

Hanauer v. *Republic Bldg. Co.*, 216 Wis. 49, 225 N. W. 136 (1934);

Langever v. *Miller*, 124 Tex. 80, 76 S. W. (2nd) 1025, 96 A. L. R. 836 (1934);

State ex rel. Roth v. *Waterfield*, 167 Okla. 207, 29 P. (2nd) 24 (1933);

State ex rel. Cleveringa v. *Klein*, 63 N. D. 514, 249 N. W. 118, 86 A. L. R. 1523 (1933);

Adams et al. v. *Spillyards et al.*, 187 Ark. 641, 61 S. W. (2nd) 686, 86 A. L. R. 1493 (1933).

Clearly, the New York statute, Chapter 794, Laws of 1933, must be held violative of appellant's contract rights.

It is to be noted that the New York act referred to does not postpone foreclosure where interest and taxes are *not* paid. It does not prevent or postpone actions on bonds where interest and taxes are *not* paid. It simply provides that *where the mortgagor is in default,* the mortgagee will be required to suffer a loss of his rights, if he pursues *any* remedy, and the New York act is held to apply to appellant's contract.

Such an act violates every principle of equity and cannot be sustained under Article 1, §10, of the Constitution of the United States.

Respectfully submitted,

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APPENDIX.

The New York Statute, Chapter 794 of the Laws of 1933, reads as follows:

"AN ACT to amend the civil practice act, in relation to deficiency judgments in actions to foreclose mortgages on real property and actions to recover judgments on bonds secured by mortgages on real property.

"Became a law August 28, 1933, with the approval of the Governor Passed, on message of necessity, three-fifths being present.

"The People of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. It is hereby declared that a serious public emergency affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, and the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

"§2. The civil practice act is hereby amended by inserting therein two new sections, to be sections ten hundred and eighty-three-a and ten hundred and eighty-three-b, as follows:

"1083-a. LIMITATION UPON DEFICIENCY JUDGMENTS DURING EMERGENCY PERIOD.—No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section where the mortgaged property shall be sold during the emergency, except as herein provided. Simultaneously with the making of a motion for an order confirming the sale or in any event within ninety days after the date

of the sale, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus cost and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.

"§ 1083-b. JUDGMENTS IN ACTIONS ON BONDS.—In any action pending at the time this section as hereby added takes effect, or hereafter commenced during the emergency, other than an action to foreclose a mortgage, to recover a judgment for any indebtedness secured solely by a mortgage on real property and which originated simultaneously with such mortgage and which is secured by such mortgage, against any person or corporation directly or indirectly or contingently liable therefor, any party against whom a money judgment is demanded, shall be entitled to set off the fair and reasonable market value of the mortgaged property less the amounts owing on prior liens and encumbrances. In any action to foreclose the mortgage commenced after the emergency as defined by the law shall have expired, a deficiency judgment may be recovered as though this section had not been

enacted but the amount of any money judgment recovered as provided in this section shall be deducted in computing such deficiency judgment.

"3. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, provision or part hereof.

"4. The period of the emergency hereby declared shall be from the date this act takes effect until July first, nineteen hundred thirty-four. This act shall not apply to mortgages dated on or after July first, nineteen hundred thirty-two, or to any bond, collateral bond, guarantee, or extension agreement or other agreement or writing concerning or delivered in connection with any indebtedness secured by a mortgage dated on or after July first, nineteen hundred thirty-two.

"5. This act shall take effect immediately."

By Chapter 277, Laws 1934, the period of emergency was extended to July 1, 1935; and by Chapter 2, Laws of 1935, was further extended to July 1, 1936. It has since been extended to July 1, 1937.